According to the 2001 national census, the aboriginal population is the fastest-growing segment of the Canadian society. In 2001 nearly 1,000,000 people identified themselves as aboriginals. This represents an enormous increase over the 1981 data when 490,000 people identified themselves in the same category. Although the 100% increase is linked, in part, to natural growth (more than one half of the aboriginal population is under the age of 25), the real growth is linked to the recent changes in the legal definitions of “aboriginality”.

Deciding the issue of aboriginal identity

Since the end of the period of military interdependence (which came to a close after the war of 1812-1814) the overall thrust of the Canadian Indian policy had been to limit the Indian expenditures. Cost saving measures went hand in hand with “civilizing” objectives. Both in the United States and in Canada, stress was placed on assimilation, although conducted under different names and with the help of different tactics. As one scholar noted: “the historical difference between American and Canadian handling of native populations was that the United States decimated theirs by war, Canada theirs by starvation and disease” (Franks, 212).

While the US policy-makers strived, since the 1930s, to clarify the legal and political framework within which aboriginal self-government should evolve, their Canadian counterparts moved in various, oftentimes contradictory directions, hoping that the “Indian problem” would solve itself through the “extinction of the Indian race”. As one scholar put it, the authorities perceived themselves “custodians of the dying race” (Franks, 227). The “thaw” of the Canadian Indian policy began only after the end of World War II. The

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1 In the light of the Canadian law, the term “aboriginal” includes Indians, Métis and the Inuit. The 2001 census lists 976,000 aboriginal people (Statistics).
Canadian society, deeply troubled by the extent of Nazi crimes, was forced to ponder the power of race-based legislation, and its potential for creating injustice. Changes to the Indian Act were a matter of time. In 1951, following the recommendations of a special Senate and House of Commons task force, the government introduced far-reaching changes to the Act. Notable among them was the right for Indian women to vote in band elections.

Among the many changes included in the revamped Indian Act of 1951, the authorities inserted a clause known in official parlance as “Double Mother Rule”. Technically speaking the clause is referred to as section 12 § 1 (a) (iv) of the Indian Act. The new provision stipulated that people whose paternal mother and grandmother had no status upon marriage, be dropped from the Indian list. The new law added a peculiar twist to the exclusionary practices of the past: hereafter some men could also be declared ex-Indians and purged from the lists. “Double Mother” was a clear sign that the government was clearly committed to the “abolitionist” agenda. While opening the door to more frequent enfranchisements, the clause further reinforced the importance of paternal descent. Mothers’ ability to confer status on their children had been further reduced. This had to further weaken the social position of the aboriginal women within their communities. The struggle to strike down the discriminatory laws began in the 1960s and was led by a group of women who were as courageous as they were desperate. A discussion of this campaign (that went as far as the Supreme Court of Canada and then on, to the Hague) would clearly extend beyond the frame of this article. The time of further radical changes came in 1982, when the new Constitution provided room for Native rights. Section 35 of the Constitution entrenched the ancestral rights of Indians, the Inuit and the Métis. The most poignant part of section 35 states that: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”. Interestingly, section 25 of the Constitution provided the envisaged aboriginal self-ruling communities with immunity against the application of the new Canadian Charter of Rights and Freedoms. Referring to privileges and entitlements recognized by the Royal

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2 A detailed discussion of this issue is to be found in most of the surveys of recent aboriginal history and, in particular, in vol. 4 (chapter 2) of the Report of the Royal Commission on Aboriginal Peoples (Canada, 1996). Also see: (Jamieson).

3 Melvin H. Smith argues, that the Canadian courts’ reading of the meaning of section 35 has been interpreted far beyond anything that had been intended by its framers (Smith, 677-691).
Proclamation of 1763 and the subsequent land claims, the Constitution states that: “the guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada”.

In the aftermath of the “patriation” of the constitution Ottawa came to the conclusion that its “Indian policy”, which was indefensible in the light of Canada’s own legislation, made it vulnerable to legal action. In 1983 the so-called Penner Report (commissioned by Ottawa) signaled a departure from previous policies and indicated an urgent need for the expansion of Native self-government. The report not only advised the government to open “nation-to-nation” negotiations with aboriginal bands; it even suggested province-like powers for the aboriginal governments. It was a radical departure from the modest proposals based on the municipal model, elaborated by another committee, in 1966. After the Penner Report, it became obvious that Ottawa needed to intervene in two highly volatile areas of its “Indian” policy: it needed to remove the gender-based discrimination from the existing legislation and to resolve the issue of aboriginal identity. In other words, to establish who was and who was not an Indian.

**Bill C-31**

The issue of aboriginal self-government is intrinsically linked to the fundamental question of native identity. The Canadian governments understood early the significance of this question, and decided to regulate the meaning and the sense of “Indianness” already in 1850. The first definition, adopted by the legislatures of Upper and Lower Canada, was vague, and left the final determination of belonging still in the hands of natives. This was, however, soon to change. In 1857 the legislation opened the door to enfranchisement, or the loss of Indian status. An Indian could loose his entitlement having acquired higher education. Leaving the country for an extended period of time would produce the same result. Temporary loss of status would also be the lot of aboriginal soldiers serving in the Canadian armed forces. The exclusion based on marrying-out was, however, by far the most important factor from the point of view of aboriginal demographics. The first legislated discrimination of Indian women occurred in 1869, when the government of Canada introduced and enforced the patrilineal system. It was particularly offensive since for many nations of the Northeast and the Prairies the lineage had always been associated with the mother’s side. Thereafter, the all-important question of Indian identity
has been firmly linked to the father’s side. In 1876 the government of Canada undertook another step, consolidating the existing pieces of legislation, ministerial regulations and Indian agents’ suggestions into the sweeping Indian Act. The new legislation proved to be one of the most change-resistant laws of the land, went on to survive the next 130 years, and still is in force today. Among other provisions, the Act stipulated that women surrender their status upon marriage to non-Indian men and become “legally white”. The exclusion extended to children, as well. The legislation was gender-specific in that it targeted women, while allowing men to bestow their status on non-aboriginal spouses and their children (Gilbert, 18-20). The all-important passages were, respectively, section 11 § 1 (f) and section 12 § 1 (b) of the Indian Act. The former stipulates that a woman acquires Indian status when marrying an Indian man, while the latter takes away the status from women who “married out”.

On July 17, 1985 Parliament passed Bill C-31, a set of fundamental changes to the Indian Act. Officially known as “An Act to Amend the Indian Act”, the Act set out to correct the wrongs of the past by removing the gender-based discrimination from the Indian Act. This, at least, was the stated objective of the Canadian government responding to internal pressure of aboriginal women’s groups and their supporters and to the criticism expressed by the United Nations Human Rights Committee. In order to secure the aboriginal Chiefs’ cooperation concerning the “gender file”, the Tories agreed to a new deal on self-government. In practice, the price for restoring status to thousands of previously excluded women was to expand the powers of the chiefs.

By the end of the 1970s it became obvious to the observers of the aboriginal scene that the goals of Indian women fighting for reinstatement were not compatible with the wishes of the majority of the chiefs. For one, the inclusion of new members on the band rolls would, inevitably, put strain on scarce resources and strain the already stretched budgets of Native communities. For the other, from the chiefs’ point of view, the reinstates (or the “C-31s” – as they soon became known) had no voice, since they were not entitled to vote in band elections. Finally, reinstatement was perceived as one more insult added to previous injuries, when the government kept defining aboriginal identity by the legal fiat. The hostility of the chiefs to women’s drive for reinstatement found its expression in legal briefs submitted by the bands to the Department of Indian and Northern Affairs (DIAND). Among the 600 plus aboriginal communities, more than 300 called for
retirement of the “Double Mother Rule” (this being the only way for Indian men to loose status), while only 112 bands asked the government to suspend section 12 § 1 (b) of the Indian Act.

In return for their support for reinstatement, the chiefs asked for expanded on-reserve powers and for increased funding for the self-governing communities. They also requested that the government abstain in the future from imposing any further definitions of aboriginality. Thereafter, the chiefs argued, Amerindians themselves would be the only people able to define the characteristics of their own identity. Defining who is and who is not a member of a community was to become the corner stone of the planned self-government. In order to control the citizenship, the chiefs requested the right to draft local constitutions. These constitutions, known as membership codes, would specify in detail the criteria of belonging adopted by each nation, band or tribe and a list of rules that would establish the processes of inclusion and exclusion from the group. The government was ready to grant the chiefs their request but insisted that “C-31s” be added to the band lists before the takeover of membership rules by the bands, rather than after.

Bill C-31, although hailed widely as a sign of progress and a huge step in the right direction, carried within itself grains of future discord. Although the reinstatement of several thousands of people helped to correct the wrongs of the past, the Bill created new divisions in the aboriginal society. Instead of two distinct legal groups of Indians (status and non-status) there were now four. Since the bands have acquired the right to develop their own definition of membership, some individuals became band-members without parallel recognition by the state (therefore, without status), many others gained status but remained “unaffiliated” with any particular nation or band. At first sight, the two groups gained equal access to the benefits related to the Indian status. The reinstatement the Indian list followed, however, two distinct paths. The “real” or “pure-blooded” Indians had a much higher capacity to confer the Status on their children. A profound distinction had been put in place, although its full impact was removed well into the future.

Children of two status Indians were admitted to the Indian Act under section 6 § 1. Children of interracial couples (status-non-Indian) were admitted under section 6 § 2. This meant that in the future, unlike their 6 § 1 counterparts, they would have to look for “Indian” spouses, or risk loss of status for their children. (Research, 1989, 11) This new rule, today known
as “Second-Generation Cut-Off”, is gender-neutral and thus seen by the authors of C-31 as a major improvement over the Double-Mother Rule and, of course, over the infamous section 12 § 1 (b).

In addition to the problems inherent to the Bill, the lack of funding aggravated the situation even further. Contrary to promises made at the negotiating table, the bands received no funds to accommodate the Bill C-31 reinstatees (Canada, 1987, 19). The government had a very vague idea as to the number of Amerindians who, eventually, would apply for status under C-31. The rough projections ran anywhere from 10 to 15 thousand. As of the end of 1999 the DIAND had received 218,802 applications! (Aboriginal, 67) Interestingly, while no fresh resources had been committed to social assistance and housing (the two most obvious candidates for growth under C-31), there was ample funding for creation of membership codes and for band development.

The second part of Bill C-31 involved the enhanced powers for aboriginal self-government. The most fundamental right and power of every self-governing community is its ability to decide who is and who is not a member. Therefore, the bands’ ability to control its own membership was at the root of post 1985 changes. The DIAND, while leaving Amerindians free to develop their own, culturally-appropriate models, nevertheless indicated its strong preference for democratic solutions. An information booklet warned the bands that: “although blood degree may be a desired criteria because it ensures that the so called “Indian purity” of a Band is maintained, it may produce undesired results as it could exclude individuals from membership who are culturally or socially more a part of the Band than someone with the required degree of blood” (Canada 1990, 16). The bands, however, opted for a variety of different rules. Some nations chose not to draft any codes at all, and remained under the regulations of the Indian Act.

The blood-quantum codes were directly linked to the long-lasting attempts by the Canadian state to impose on Amerindians such, and no other understanding of aboriginality. The issue of “full” or “half-blood” as requirements for belonging never appeared in Amerindian discourse prior to the mid-19th century. The introduction, in the 1850s, of race-based criteria of belonging, could not fail to have an impact on aboriginal societies. After several decades under the tutelage of the Indian Act native communities started to incorporate the race-based model into their own perception of aboriginality.
The importance attached to “Indian blood” and to “Indian characteristics” contributed to the development of the race-based concept of identity. A concept embodied in numerous contemporary membership codes. The blood quantum can be defined as “tribal”, or “Indian”. The former refers to people of local native ancestry, sons and daughters of the tribe in question, while the latter denotes any other form of aboriginal descent (Research 1999, 12).

The Mohawks of Kahnawake, Québec, involved in a long-standing dispute with the Canadian and the US governments for the recognition of their self-government, pre-empted Bill C-31, introducing a moratorium on mixed marriages already in 1981. The 1981 moratorium stipulated that any Indian man, or woman, marrying a non-Indian, automatically forfeited their membership in the Kahnawake community. The same applied to the children of such couples. The term “Indian”, as used by the Mohawks, referred to people with “at least 50% of Indian blood” (Alfred, 163-174; Clatworthy 1998). The establishment of blood-quanta as a basis of defining aboriginality narrowed the gap between official Indian status and band membership but threatened to exclude an ever growing segment of the aboriginal population. The establishment of blood-quanta as a basis of defining aboriginality narrowed the gap between official Indian status and band membership but threatened to exclude an ever growing segment of the aboriginal population.

The Manitoba Southern Chiefs Organization (SCO) represents 36 bands from southern and central Manitoba. The SCO population counts over 56,000 people of which 30% is registered under section 6 § 2. Among the children the percentage of section 6 § 2 registrants is close to 50% (Clatworthy 2001). Given the fact that the out-marriage among the SCO Amerindians runs at 44%, it is a question of time, when there will be no one left who can register as an Indian. It is, to be more precise, a question of three generations. The debate over the purity of aboriginal blood and its practical ramification often overlooks the sharp contrast between the legal treatment of the Indian and that of the black race. The black race has been legally defined, and is still tracked today, on the basis of the so-called hypodescent, or “one drop rule”. In other words, any amount, however slight, of “black blood” determines the racial classification of the person (Zack, 120-132). In the case of determination of North American Indian racial identity something quite opposite has evolved. In order to be recognized as an Indian, an individual has to prove a high, or very high degree of “racial purity”.

At the end of the 1990s the federal government has found itself under increasing pressure from the public opinion and from the Auditor General to impose stricter rules of accountability regarding public spending. The Indian Affairs, whose budget was the only sector of public spending that
escaped wide ranging austerity measures of the previous decade, came under scrutiny as well. Some evidence pointed to the fact that the vast amounts of money produced little, if any, effect among the impoverished inhabitants of reserved territories, for whom they were destined in the first place. Each and every year Ottawa budgets 7.5 billion dollars to cover the cost of Indian policy. Close to 6 billion is transferred directly to band councils. In the 1990-2002 period expenditure grew by 100%. A similar attempt of direct fund-transfer made after 1975 in the US resulted in popular backlash on the part of the impoverished members of Indian communities, who felt their livelihood threatened. Although signs of unrest are visible, similar backlash has not yet occurred in Canada. In 2002, in response to the concerns voiced, Robert Nault, the minister of Indian Affairs, gave his approval to the development of a new policy, known as FNGA, or the First Nations Governance Act. The Act, if passed, would have empowered the rank-and-file members of aboriginal communities, giving them a degree of control over their own band leaders. At the same time, however, the Act would have given the authorities a measure of control over the self-governing institutions. The Act, roundly condemned by the Assembly of First Nations (AFN) and the chiefs, received significant support from the National Aboriginal Women’s Association and from the Congress of Aboriginal Peoples: an organization representing off-reserve natives and traditionally wary of the on-reserve authorities. The resentment and the hostility of the AFN and the chiefs against the planned legislation rapidly translated into political pressure. In December 2003 the so-called Bill C-7, earlier disavowed by the incoming premier Martin, died on the floor of the dissolved Parliament.

The public opinion seems to be divided over the issue of aboriginal plight. On the one hand, reservations are – undeniably – breeding grounds for poverty, crime and a host of other social ills. On the other hand, the same reservations enable aboriginal communities to preserve their land. Land that, if allotted on individual basis and exposed to regular market practices would, most probably, be alienated. Similar controversy concerns the various perceptions of the collective character of reservation life. For the right side of the Canadian political scene, the continuing existence of state-sponsored collectivism is a recipe for an economic and a social disaster for the concerned communities. For the left-leaning observers, the community-based rules that stress the importance of common good over private greed are close to heart. The government and the Native elites seem inclined to work on preserving the status quo as long as it is possible. Difficult issues (and to call the Native plight a “difficult issue” is an understatement) require often
controversial and unpopular decisions. And making unpopular decisions is in present-day Ottawa definitely not a priority.

Works Cited


